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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 357

IMPERIAL OIL LIMITED,

Petitioner,

vs.

FRANK DRLIK,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

IMPERIAL OIL LIMITED,

Petitioner,

vs.

FRANK DRLIK,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on June 5, 1956.

OPINIONS BELOW.

The oral opinion of the District Court is reported at 141 Fed. Supp. 388, and appears in the Record at pp. 347a to 356a (Appellant's Appendix in the United States Court of Appeals), nine additional copies of which are filed herewith. The opinion of the Court of Appeals is reported at 234 F. (2d) 4, and is reproduced in the Appendix hereto, p. 18, *infra.*

JURISDICTION.

The judgment of the United States Court of Appeals was entered on June 5, 1956. (App. p. 30, *infra.*) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in a negligence action, in admiralty, brought against a vessel owner by a shore employee of an independent contractor, assumption of risk is a complete defense.
2. Whether the respondent knew or was chargeable with knowledge that the winch was being operated without a watchman being stationed at the rail and was, therefore, guilty of contributory negligence in handling the cable under such circumstance.

STATUTES INVOLVED.

In our opinion, neither the Jones Act, 46 U. S. C. Section 688, nor the Federal Employers Liability Act, 45 U. S. C. Section 54, are here involved. However, since the opinion of the United States Court of Appeals contains a general reference to those statutes (App. p. 23, *infra*), they are printed in the Appendix hereto, *infra*, p. 17.

STATEMENT OF THE CASE.

This case involves an action brought in admiralty, by the respondent, an employee of The American Ship Building Company, against the petitioner, as owner of the Steamer Imperial Leduc, for injuries sustained during the undocking of that vessel on August 8, 1952. The case was tried to the United States District Court at Cleveland, without a jury, and resulted in an award in favor of the respondent in the sum of Sixty-Four Thousand Nine Hundred Fifty Dollars ($64,950.00). Judgment in that amount was entered on February 15, 1955. (R. p. 361a.)

Several months prior to the date of the accident the Imperial Leduc had been seriously damaged as a result of an explosion and fire which had occurred at Sarnia, On-

tario, and the repair of that damage was being accomplished by the ship building company at its Toledo yard. At the time of the accident the vessel was afloat in the drydock preparatory to being undocked for removal to an adjacent marginal pier for completion of repairs. (R. p. 8a.)

During the morning of August 8th, the various preparatory steps necessary in undocking the vessel had been done. The vessel was headed bow in, with four of her mooring cables running from winches on her deck to spiles located ashore. The movement of the vessel out of the drydock was to be accomplished by moving the cables from the spiles to which they were already attached to spiles located nearer the river, whereupon the cables would be drawn taut. The respondent was the senior member of a gang of three dock employees who had been detailed by their own employer, the ship building company, to handle the shore end of the cables on the Leduc's port side. (R. p. 180a.)

The assisting in the undocking of vessels took only a small portion of the respondent's total working time and when not so engaged he bolted up plates, helped on the staging and did other miscellaneous jobs. (R. p. 290a.)

On the day in question, as she lay in the drydock, the Leduc's port side was about twelve feet from the dock wall and her deck was approximately fifteen feet above the dock. The slacking out and hauling in of the cables were brought about by the operation of a winch by one of petitioner's employees. After putting a strain on the cable he would then release it and the respondent and his companions would then move it to the next spile where the operation would be repeated. The winch in question was located on the starboard side of the vessel and, while the winchman was at the winch, he could not see the dock crew handling the cables, nor could they see him. No

watchman had been stationed at the rail of the vessel to advise the winchman as to the movements of the dock crew. (R. pp. 83, 139a.)

During this operation the respondent's two companions handled the "eye" of the cable which was placed over the spiles, while the respondent handled the slack part, between the other two men and the vessel. During the movement along the dock the slack of the cable became caught several times on the ends of railroad ties of a railroad which paralleled the side of the drydock and the respondent would reach down and pull the cable from under the ties. At the time of the accident the respondent was in a stooped position, having just extricated the cable from under a tie, when the winch, unexpectedly and without warning to the respondent, was set in motion, thereby causing him to be thrown into the air. The respondent landed upon his head and side on the railroad tracks, sustaining severe injuries. (R. pp. 112a, 141a, 142a.)

In operating the winch the petitioner's employee went some four or five times from the winch to the port rail of the vessel and made visual observations for the purpose of determining when to apply and when to release the tension on the cable. The hauling in of the cable, which resulted in the accident to the respondent, was based upon the last observation of the respondent by this employee, while the latter was at the rail and before he returned to the winch. (R. pp. 170a, 171a.)

It was alleged in the libel that injuries sustained by the respondent were directly caused by the unseaworthiness of the vessel in that the winchman was incompetent and no watchman had been stationed at the rail to advise the winchman as to the presence of the dock employees near the cable. The libel further alleged that the petitioner was negligent in failing to observe the respondent, with the

cable in his hands, before starting the winch; in failing to warn the respondent and in creating an unsafe place for him to work. The petitioner denied the allegations of unseaworthiness and negligence and pleaded, affirmatively, the defenses of assumption of risk and contributory negligence. The defense of assumption of risk was based upon the contention that the respondent knew that no watchman had been stationed at the rail and that the winchman was, therefore, operating the winch blindly. The alternative defense of contributory negligence was based upon the contention that if the Court found that knowledge of the absence of the watchman did not exist, the respondent's handling of the cable without ascertaining the facts relative to the presence or absence of the watchman, constituted lack of proper care on his part.

The District Court found that the failure of the ship's officers to post a watchman at the rail and the operating of the winch in the absence of such a watchman, constituted "unseaworthiness of the vessel and negligence" and created, for the libelant, an unsafe place in which to work. (R. p. 350a.) That Court also ruled that the respondent's task was to watch the cable and that inasmuch as he could not see who or what was on the deck above him, he had not assumed any risk, nor was he guilty of contributory negligence. (R. p. 351a.)

The Court of Appeals, on the issue of unseaworthiness, ruled that there was no evidence that the winchman was incompetent, or that the vessel or her equipment was defective. It ruled that the accident arose out of the negligent use of seaworthy equipment and that the obligation of a vessel owner to provide seaworthy appliances has not been extended to require the owner to keep those appliances from being used in a negligent manner. (App. p. 22.)

In the Court of Appeals the petitioner did not challenge the finding of negligence, nor does it do so here. It contended there, as it does here, that the defense of assumption of risk is applicable, where, as here, liability is based upon negligence in a case involving a shore employee.

As to the defense of assumption of risk the Court of Appeals ruled that the common law rules are not controlling in admiralty. That Court conceded that the cases cited by the petitioner were to the effect that the defense was available in cases involving non-seamen, but it ruled that those cases must be held to have been overruled by the following subsequent decisions of this Court: (*Seas Shipping Co. Inc. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc. v. Hawn, et al.*, 346 U. S. 406, and *Alaska Steamship Co. Inc. v. Petterson*, 347 U. S. 396) which had "apparently eliminated distinctions heretofore recognized in Admiralty between seamen on the one hand and stevedores and independent contractors performing maritime services for a vessel on navigable waters, on the other hand." (App. p. 23.)

Finally, on the issue of assumption of risk, the Court of Appeals ruled that although the above-mentioned decisions of this Court dealt with liability based upon unseaworthiness, rather than negligence, the implication of those decisions, when considered in connection with the doctrines announced in *The Arizona, et al. v. Anelich, Admx.*, 298 U. S. 110, and *Socony-Vacuum Oil Company v. Smith*, 305 U. S. 424, justified the conclusion that the defense is not available in this type of action. (App. p. 24.)

The Court of Appeals conceded the legal applicability of the defense of contributory negligence, but ruled that

it had not been conclusively established by the evidence that the respondent knew, or should have known, that the winch was being operated without a watchman being stationed at the rail to give the necessary signals. (App. pp. 23-24.)

On the issue of damages the Court of Appeals affirmed the findings of the District Court, except as to loss of wages. The amount of the award was reduced to Fifty-Four Thousand, Eight Hundred Sixty-Seven Dollars ($54,867.00) and, as so modified, was affirmed. (App. p. 30.)

Following the entry of the judgment by the Court of Appeals on June 5, 1956, the respondent moved for the allowance of interest from the date of the judgment of the District Court. On July 5, 1956, this motion was denied.

REASONS FOR GRANTING THE WRIT.

1. The decision below is in conflict with the decisions of the United States Court of Appeals for the Second Circuit in cases of Scheffler v. Moran Towing & Transportation Co. Inc., 68 F. (2d) 11, 12; Cunard S.S. Co. Limited v. Smith, 255 F. 846 and The Saratoga, 94 F. 221. The decision below is also in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in Gaderson v. Texas Contracting Co., 3 F. (2d) 140, and with the decision of the Court of Appeals of New York in Yaconi v. Brady & Gioe, Inc., 246 N. Y. 300, 306, 307.

Scheffler v. Moran Towing, supra, involved an action in admiralty brought by a cook on a harbor craft for injuries sustained on board the vessel. He served on the craft during the day, leaving each night to go home and renewing his work the next day like other shore workmen. In ruling that the defense of assumption of risk was valid the Court said (p. 12):

"* * * Such men are in the position of longshoremen or other casual workers on the water (cases cited) who assume all obvious risks, quite as though they were injured on shore. * * *"

Cunard S.S. Line v. Smith, supra, involved an action at law brought by a longshoreman against the vessel owner for injuries sustained as a result of the defendant's negligence. The plaintiff was one of a gang of six men who were engaged in filling tubs or buckets with dirt, after which they were hoisted from the hold to a lighter, their contents dumped and the containers returned to the hold. There were usually "landing" men in the hold, whose duty it was to take charge of the buckets and to signal the others when they were coming down. The plaintiff, who was struck by a descending bucket, knew that no "landing" men were present on the night of the injury. In holding that the plaintiff had assumed the risk the Court said (p. 849):

"In this case the elements out of which the danger arose were plainly visible. There was nothing present calculated to blind the plaintiff to his danger. The danger involved in working in the hold under the circumstances must have been understood by him every minute of the time he was at work that evening, and he could not have but known that he was liable to receive the injuries which he suffered and for which he seeks to recover. One who under such circumstances works assumes the risks as matter of law. For any person of ordinary prudence knew that to work under such conditions necessarily endangered his safety. *Butler v. Frazee,* 211 U. S. 459, 467, 29 Sup. Ct. 136, 53 L. Ed. 281."

In *The Saratoga, supra,* the action was in admiralty brought by a longshoreman who was injured while engaged in coaling a steamer while she lay at the pier. The

accident occurred when the libelant fell through a hatch opening into the hold and the negligence charged was the failure to have the deck properly lighted and the hatch cover on. The Trial Court had held both parties at fault and had divided the damages. The Court of Appeals ruled that the libelant has assumed the risk of the dangers involved and directed that the libel be dismissed.

In *Gaderson v. Texas Contracting Co., supra,* the action was in admiralty brought by the widow of the deceased against the respondent, a contracting stevedore. The deceased, at the time of his death, was engaged in building a grain feeder on a vessel and the libel contained allegations that due to negligent failure to have a strongback on which the deceased was standing either bolted or fastened, it had tilted or turned, causing him to fall. The trial court ruled that the libelant had assumed the risks involved and the decree dismissing the libel was affirmed.

In *Yaconi v. Brady & Gioe, Inc., supra,* the plaintiff, a longshoreman, brought suit, at law, against the vessel owner for injuries sustained when he slipped on some grease in the hold and fell while engaged in loading the vessel. In ruling that assumption of risk was valid as a complete defense the Court of Appeals of New York stated (pp. 306, 307):

> "The plaintiff is thus remitted to the common law of the sea. No claim is made in his behalf that under the maritime law the defense of assumption of risk is excluded against one in his position. The defense is not a good one under that law when a seaman, in the ordinary sense, one subject to the authority and discipline of a master of a vessel, is injured aboard ship (*Lynott v. Great Lakes Transit Corp.*, 202 App. Div. 613; affd., 234 N. Y. 626; *Cricket S.S. Co. v. Parry*, 263 Fed. Rep. 523; cf. *Chelentis v. Luckenbach S.S.*

> Co., 247 U. S. 372). There are many decisions that it is good against a stevedore (*Cunard S.S. Co. v. Smith*, 255 Fed. Rep. 846; *D., L. & W. R. R. Co. v. Tomasco*, 256 Fed. Rep. 14; cf. *Maleeny v. Standard S. Corp.*, 237 N. Y. 250, 255; Holmes, J., in *Knickerbocker Ice Co. v. Steward*, 253 U. S. 149, 167). A stevedore, however styled under the Jones Act, is not a seaman under the rule of the general maritime law with its special exemption to those subject to the power of the master (*Int. Stev. Co. v. Haverty, supra*). One might as well bring within that class a laborer employed by a contractor to repair a vessel in a dry dock (*Butler v. Robins Dry Dock & Repair Co.*, 240 N. Y. 23). *Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which apply to seamen and no others. No one would think of saying that his damages would be measured by maintenance, cure and wages* (*Chelentis v. Luckenbach S.S. Co., supra*; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255) 'Words,' as we are told, 'are flexible' (*Int. Stev. Co. v. Haverty, supra*)." (Emphasis supplied.)

Three of the five above-mentioned cases involve actions brought in admiralty. In all five of the cases the defense of assumption of risk was held to be available and valid as a complete defense. The Court below, in ruling that that defense is not available, as a matter of law, has rendered a decision which is in direct conflict with those decisions on the same matter.

2. In ruling that assumption of risk is not a complete defense in a negligence action in admiralty brought by a shore employee of an independent contractor against a vessel owner, the Court below has decided an important question of federal law, which has not been, but should be settled by this Court.

This Court in *The Arizona v. Anelich, Admx.*, 298 U. S. 110, and in *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, has ruled that in actions brought by seamen, under the Jones Act, the defense of assumption of risk is not available. This Court has also in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot Inc. v. Hawn, et al.*, 346 U. S. 406 and in *Alaska S.S. Co. Inc. v. Petterson*, 347 U. S. 396, extended the warranty of seaworthiness to stevedores and to ship repairmen engaged in performing services on board vessels and has declared that where unseaworthiness is involved, assumption of risk is not a defense. The case at bar does not involve unseaworthiness, nor is it an action brought by a seaman, under the Jones Act, whose provisions specifically outlaw that defense. To our knowledge this Court has not yet spoken as to whether that defense is available, in admiralty, where a non-seaman is suing and negligence alone is involved and a determination of that question, by this Court, is required in order to maintain a uniform application of the principles of admiralty law.

3. The Court below, in ruling that assumption of risk is not available as a complete defense, relies upon what it believes to be the rationale of the above-cited decisions of this Court. The Court of Appeals has, we believe, misconstrued the implications of those decisions and the writ should be granted so that this Court may, if it considers it necessary, explain, clarify or distinguish those decisions.

In *The Arizona v. Anelich, Admx., supra,* 298 U. S. 110, the question involved was whether assumption of risk was a defense to an action brought under the Jones Act (41 Stat. 1007, 46 U. S. C. § 688) to recover damages for the injury and death of a seaman caused by a defective appliance. This Court ruled that that Act, when construed in connection with the admiralty principle that seamen, because of the nature of their calling and the practical difficulties of avoiding exposure to risks of unseaworthiness and defective appliances, made the defense peculiarly inapplicable to such suits.

Socony-Vacuum Oil Company v. Smith, supra, 305 U. S. 424, also involved a suit brought by a seaman under the Jones Act for injuries resulting from his use of a defective appliance. This Court, in ruling that assumption of risk was not a complete defense, again pointed out that "the seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. * * *" (p. 430) and stated also that as seamen are wards of the admiralty, the application of the common law rules to them, has been traditionally avoided. In that decision, however, this Court also pointed out that there is a class of maritime workers against whom the defense of assumption of risk has been allowed, who cannot bring an action under the Jones Act

and who has neither the status, nor is entitled to the protection which seamen enjoy. In that connection this Court said (p. 429):

> "In some cases arising after the Jones Act where the defense was allowed, the employee was thought to have had the status of a stevedore or shore worker and not that of a seaman. *The Maharajah*, 40 F. 784; *Cunard S.S. Co. v. Smith*, 255 F. 846; *Hardie v. New York Harbor Dry Dock Corp.*, 9 F. 2d 545; *Skolar v. Lehigh Valley R. Co.*, 60 F. 2d 893; *Scheffler v. Moran Towing & Transportation Co., supra*, 12; *Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300, 306; 158 N. E. 876. * * *"

To our knowledge these are the latest words which this Court has spoken with reference to the availability of the defense in negligence actions involving non-seamen and they distinctly negative the construction sought to be implied, by the Court of Appeals, from that decision.

The Court of Appeals suggests that since the decisions of this Court in the *Sieracki, Pope & Talbot* and *Petterson* cases, *supra*, the distinction, heretofore recognized in admiralty between seamen on the one hand and stevedores and independent contractors performing maritime services for a vessel on navigable waters on the other hand, has been eliminated. (App. p. 23.) Even if it be assumed that that conclusion is correct in respect to liability based upon unseaworthiness and defective appliances, there is nothing in those decisions which justifies an elimination of the distinction where negligence alone is involved. The accident in the case at bar did not involve a defective appliance or any species of unseaworthiness. The respondent herein was a shore worker who was not on the vessel at any time, was not performing a service of essentially maritime character and was not subject to the discipline, nor

the hazards, which are an integral part of the life of a seaman. If this class of worker, in this type of action, is entitled to receive the protection heretofore reserved for seamen, alone, that determination should be made by this Court and should not rest upon a strained and an erroneous construction placed upon its decisions by the Court of Appeals.

4. Because of its ruling, as a matter of law, that the defense of assumption of risk was not available, the Court of Appeals was not required to, nor did it determine whether the respondent had, in fact, assumed the risk of handling the cable with knowledge that no watchman was stationed at the rail. On the issue of contributory negligence the Court did, however, rule that it had not been conclusively established that the respondent knew or should have known that the winch was being operated without a watchman being at the rail.

Under ordinary conditions we would not request this Court to review a finding which has been determined by the two lower courts. Here, however, it is established by the undisputed testimony of the respondent, himself, that he could and did see that no watchman was at the rail and that he knew that the winch was being operated while the rail was unattended. The following testimony of the respondent contains clear-cut admissions to that effect (R. p. 141a):

> "Q. And now, it is a fact, is it not, Mr. Drlik, that you carried that line along the edge of that dry dock knowing that there was no one there at the rail to give signals to the winchman? That is true, isn't it? A. (Witness shakes head.) I didn't get you.
>
> Q. I say you were carrying that line as you described on your direct examination, you were walk-

ing along the edge of that dry dock with the line in both of your hands trying to keep it clear of the ties. You did that? A. Yes.

Q. Knowing that there was no one on the deck of the vessel, at the rail of that vessel to signal the winchman, didn't you? A. No.

Q. You were aware that there was no one at the rail there to give signals to the winchman, weren't you? A. There was no man by the rail when I carried the line.

Q. *And you knew that there was no one there, didn't you?* A. *Yeah.*

Q. And you walked right along carrying that line knowing that there was no one at the rail to give signals, didn't you, to the winchman? A. (No response)." (Emphasis supplied.)

(R. p. 111a):

"Q. How close were you men to getting the eye of that cable on the next button when the thing went up in the air? A. I don't know that. I never looked —I pay attention to my lines so she don't cut. *Every once in a while I looked on the deck.*

Q. *What did you see on the deck?* A. *If I can locate a man, but I didn't see any.*

Q. Was there a man along the rail of that deck to your observation at any time while you were walking that forty-five or fifty feet? A. No. I don't see any." (Emphasis supplied.)

In view of these admissions by the respondent himself, the writ, we respectfully urge, should be issued to correct a manifest error.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Title 46 U. S. C. Section 688.

Recovery for injury to or death of seaman.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153 § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Title 45 U. S. C. Section 54.

Assumption of risks of employment.

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury

or death of such employee. Apr. 22, 1908, c. 149 § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decided June 5, 1956.

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellee, Frank Drlik, brought this action in Admiralty to recover for injuries sustained by him while acting as a member of a dock crew in connection with the undocking of appellant's Steamer Imperial Leduc. The District Judge, hearing the case without a jury, entered judgment in his favor in the sum of $64,950.00, from which this appeal was taken.

The Imperial Leduc had been materially damaged as the result of an explosion and fire, and at the time of the accident on August 8, 1952, was being repaired by the American Ship Building Company at its Toledo, Ohio Yard. Appellee was an employee of the American Ship Building Company. The vessel was in drydock preparatory to being undocked for removal to an adjacent pier to complete repairs. She was headed bow in, with four of her mooring cables running from winches on her deck to spiles located ashore, which held her in a proper position while the drydock was being flooded.

The movement of the vessel aft into the river was being accomplished by moving cables from spiles to which they were already attached to spiles closer to the river, whereupon the drawing taut of such cables would accomplish such result. The tightening of the cables was caused by the turning on of a winch engine on the deck of the vessel by its operator Pether, appellant's employee.

After applying force and tension to the cable it would then be released by the winch operator which would provide slack in the cable and allow it to be moved by the dock crew and its "eye" placed over the next spile. The vessel was twelve feet from each side of the drydock and its deck some fifteen feet higher than the dock. When operating the winch Pether was not able to see the dock crew handling the cables. Appellant had no employee as watchman at the rail while Pether was operating the winch, who could advise Pether of the movements of the dock crew.

The handling of the shore end of the cables in moving them from spile to spile was being performed by ship yard employees, one of whom was the appellee. Drlik's companions handled the "eye" end of the cable which was to be placed over the spile while Drlik handled the slack part of the cable between his companions and the ship. During the movement along the dock the slack of the cable became caught several times on the end of railroad ties of the railroad which ran alongside of the drydock and Drlik would reach down to extricate the cable from such tie. At the time of the accident Drlik was in a stooped position with both hands on the cable just after having extricated it from a tie and just as his companions dropped the "eye" over the spile. The winch operator, unexpectedly and without warning, set the winch in motion, causing the cable to become taut with great force, which threw Drlik into the air landing on his head and side upon the railroad tracks.

In operating the winch engine Pether went some four or five times from the engine on the starboard side of the ship to its port side where Drlik and his companions were working and made visual observations for the purpose of determining when to apply and when to release

the force and tension on the cable. The final application of force resulting in the accident was made by Pether without any signal from the dock so to do or from Pether to the dock that he so intended, but was solely on Pether's observation as made the last time he was at the rail before returning to the winch engine.

It was alleged in the libel that the injuries suffered by the appellee were directly caused by the unseaworthiness of the vessel and by the negligence of the appellant; that the vessel was unseaworthy in that no watchman was stationed at the side of the vessel to advise the winch operator as to the presence of dock employees near the cable, and that the winch operator was incompetent to perform his work as appellant well knew, under the conditions then existing; and that the appellant was negligent in failing to observe the presence of the appellee with the cable in his hand before starting the winch, in failing to warn appellee of its intention to operate the winch while appellee was working with the dock end of it, and in creating for the appellee an unsafe place to do his work. The appellant denied the allegations of unseaworthiness and negligence and pleaded affirmatively the defenses of assumption of risk and contributory negligence on the part of the appellee. Both of these defenses are based on the contention that Drlik knew, or in the exercise of reasonable care should have known, that there was no watchman at the rail other than when Pether was there, and that Pether was operating the winch engine without the assistance of such a watchman to advise him of the movements of the dock crew.

The District Judge made a finding that the failure of the officers of the ship to post a watchman at the rail or to give warning to the dock crew in any form was the

proximate cause of appellee's injuries; that the ship's officers had a duty to post a watchman at the rail for such purpose; that the winch operator had a duty not to operate the winch without a watchman posted at the rail; and that such failure on the part of the appellant constituted "unseaworthiness of the vessel and negligence and created for libelant an unsafe place in which to work." He also ruled that on the facts there was a failure to establish that appellee was guilty of sole or contributory negligence or that there was an assumption of risk upon his part.

We first consider the finding of unseaworthiness. If that finding is approved the defense of assumption of risk is eliminated as a matter of law as such defense is not applicable to liability based on that ground. *Socony-Vacuum Co. v. Smith*, 305 U. S. 424, 428-429; *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 103; *The Seeandbee*, 102 F. (2d) 577, 581, C. A. 6th. Appellant contends that on the undisputed facts the finding of unseaworthiness is erroneous as a matter of law.

The Admiralty rule that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment has been the settled law since the Supreme Court's ruling to that effect in *The Osceola*, 189 U. S. 158, 175. *Mahnick v. Southern S. S. Co., supra*, 321 U. S. 96. The rule has lately been extended to stevedores and others doing a seaman's work and incurring a seaman's hazards, although not in the employ of the owner of the vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 412-413; *Alaska Steamship Co. v. Petterson*, 347 U. S. 396. Appellee would fall within the protection of the rule so extended. However, in the present

case there was no evidence that the vessel or any part of her equipment was defective. The accident arose out of the negligent use of seaworthy equipment. The obligation of the vessel owner to provide seaworthy appliances has not been extended to require the owner to keep those appliances from being used in a negligent manner. If so used, liability rests upon negligence rather than upon unseaworthiness. *Burkholder v. United States*, 60 F. Supp. 700 E. D. Pa.

Appellee relies upon *Poignant v. United States*, 225 F. (2d) 595, C. A. 2d, as establishing a different rule. However, liability in that case was based upon the temporary presence of a foreign substance on the floor of a public corridor, which, in our opinion, is not an analogous question. Nor do we find any merit in appellee's additional contention that the vessel was unseaworthy due to inadequate and incompetent personnel. There was no finding by the District Judge that the operator of the winch was not competent. The evidence, on the contrary, indicates that he was an experienced seaman. Although there was a failure to post a watchman at the port rail, the evidence does not show that a man was not available for this particular duty if the ship's officer had decided to use one for that purpose.

Liability in the present case must accordingly rest upon negligence. Appellant does not challenge the finding of negligence, but contends that the defenses of assumption of risk and contributory negligence are applicable when liability is based on that ground. Although these are well recognized defenses at common law, the common law rules are not controlling in Admiralty. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215. Dealing first with the defense of assumption of risk, appellant contends that it is applicable to the present case,

and if sustained by the facts, is a bar to any recovery, relying upon *Scheffler v. Moran Towing & Transportation Co., Inc.*, 68 F. (2d) 11, 12, C. A. 2nd, *Skolar v. Lehigh Valley R. Co.*, 60 F. (2d) 893, C. A. 2nd, *The Scandinavia*, 156 F. 403 D. C. Maine, and other authorities referred to in those opinions. See also: *Gaderson v. Texas Contracting Co.*, 3 F. (2d) 140, C. A. 5th. Appellee contends that the defense is not applicable, relying upon *Socony-Vacuum Oil Co. v. Smith, supra*, 305 U. S. 424. See also *The Arizona v. Anelich*, 298 U. S. 110.

The foregoing cases indicate that in cases involving a maritime tort, where the libelant was not a seaman, the defense of assumption of risk was applicable. However, in the Supreme Court cases above referred to, it was held that in an action by a seaman for personal injuries under the Jones Act, Sec. 688, Title 46 U. S. Code, where liability is dependent upon negligence, the defense is not applicable. Appellant contends that the Jones Act is limited to seamen, that the Supreme Court ruling is accordingly limited to seamen, and that appellant was not a seaman. However, the cases relied upon by appellant holding that the defense was applicable to libelants who were not seamen, were decided prior to the recent rulings of the Supreme Court which have apparently eliminated distinctions heretofore recognized in Admiralty between seamen on the one hand and stevedores and independent contractors performing maritime services for a vessel on navigable waters on the other hand. *Seas Shipping Co. v. Sieracki, supra*, 328 U. S. 85; *Pope & Talbot, Inc. v. Hawn, supra*, 346 U. S. 406; *Alaska Steamship Co. v. Petterson, supra*, 347 U. S. 396.

We recognize that those Supreme Court cases dealt with liability based on unseaworthiness rather than on negligence. But, as pointed out previously, the Supreme

Court has also held that assumption of risk is not a defense to a right of action by a seaman based on negligence. *The Arizona v. Anelich, supra,* 298 U. S. 110. We think the rationale of these cases leads to the conclusion that assumption of risk is not a defense to the present action based on negligence, even though the appellee was not technically employed by the appellant as a seaman. *International Stevedoring Co. v. Haverty,* 272 U. S. 50, 52. As said by the Court in *Socony-Vacuum Co. v. Smith, supra,* 305 U. S. 424, at p. 429, "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however, gross, is not a bar to recovery but only mitigates damages."

Turning to appellant's remaining defense of contributory negligence, there is no question about its legal applicability, though in a different form from its applicability at common law. In cases of maritime tort founded upon negligence and prosecuted in admiralty contributory negligence on the part of the libelant is not a bar to his recovery but operates in mitigation of damages. *The Max Morris,* 137 U. S. 1; *Pope & Talbot, Inc. v. Hawn, supra,* 346 U. S. 406, 408-409.

The District Judge, in making his finding that appellee was not guilty of contributory negligence, stated that Drlik's task was to watch the cable and that his attention was necessarily engaged in extricating it from the railroad ties, which required his constant visual attention to the cable itself, and which distracted from any opportunity on his part to watch the rail of the ship whose deck was fifteen feet above the dock on which he worked. That he knew or should have known that Pether was operating the winch engine without a watchman at

the rail assisting him is not conclusively established by the evidence. The issue was a factual one. *Gardner v. Michigan Central Railroad,* 150 U. S. 349, 361; *Foster v. Buckner,* 203 F. (2d) 527, 530, C. A. 6th. Not being clearly erroneous it will not be disturbed on this review. *McAllister v. United States,* 348 U. S. 19, 20; *United States v. Standard Oil Co. of Kentucky,* 217 F. (2d) 539, 540, C. A. 6th.

The appellant suffered severe injuries. He was rendered unconscious and was taken by ambulance to St. Vincent's Hospital in Toledo. There was a small laceration at the base of his skull. X-Rays and digital examination revealed fractures of the first through the fifth or sixth ribs. There were fractures of the left shoulder, the middle third of the fibula on the right, and of both bones of the left ankle. He developed severe phlebitis of the right leg, some involvement of the left leg, and a chest complication. He was discharged from the hospital on September 23, 1952, at which time he was using a cane. Following his discharge from the hospital his doctor made two house calls and after that saw him periodically at the doctor's office. He complained of headaches and dizziness over a period of time, by reason of which he was sent to St. Charles Hospital in March 1954 for observation and treatment. An examination on January 11, 1955, shortly after the start of the trial showed a continuance of the dizzy spells about twice a week, some pain in the head, an impairment of hearing in one ear and damage to the eighth cranial nerve, the nerve of hearing and balance. There was medical testimony that no improvement could be expected and that his condition was permanent. Dr. Gould, who made this final examination, testified that Drlik was "suffering from a distressful condition and at the same

time any attempt at work certainly would be both under duress and, in my opinion, dangerous."

Drlik was 62 at the time of the accident and was past 64 at the time of the trial. He had a life expectancy of 14.02 years, which for the purposes of a present lump sum payment was discounted to 9.25. In rendering the judgment, the District Judge divided the total amount into two parts, namely, the sum of $44,550.00 for loss of wages past and for the rest of his prospective life, and $20,400.00 for pain and suffering, making a total award of $64,950.00.

The District Judge explained his award of $20,400.00 for pain and suffering in the following way: For the first month of great misery and suffering—$100.00 a day, totaling $3,000 for the month; for the second month—$50.00 a day, for a total of $1,500.00; for the next four months—$20.00 a day, for a total of $2,400.00; for the next two years—$100.00 a month for a total of $2,400.00; for the balance of his life—$100.00 a month or $1,200 a year, discounted at the rate of 9.25, which made a total of $11,100.00, and an overall total of $20,400.00: Appellant contends that this portion of the judgment is excessive insofar as it exceeds $10,000. It criticizes the method adopted by the Court as being novel and contends that damages for pain and suffering can not be properly computed by such a mathematical formula.

In awarding damages for pain and suffering there can not be any fixed measure of compensation. The result necessarily rests in the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation. *The "City of Panama,"* 101 U. S. 453, 464; *National Bulk Carriers v. Hall,* 152 F. (2d) 658, C. A. 5th. An award will not be set aside by a reviewing court unless it is so large as to strike the court

that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or the rules of law. *Detroit, T. & I. R. Co. v. Hahn,* 47 F. (2d) 59, 60, C. A. 6th. Cf: *Great Lakes Greyhound Bus Lines v. Hightower,* 163 F. (2d) 1016, C. A. 6th. In our opinion, the amount of this portion of the judgment is not manifestly unjust, and the appellant in its brief expressly disclaims any contention that the District Judge acted through passion or prejudice.

It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem

presented and its application was so adjusted in the present case as to be consistent with the evidence and to reach a result which does not appear to us to be manifestly unjust. *United States v. Puscedu*, 224 F. (2d) 5, C. A. 5th; *City of Knoxville, Tenn. v. Bailey*, 222 F. (2d) 520, 531, C. A. 6th.

One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident. The District Judge, in making the award on this phase of the case, allowed $11,250.00 for loss of earnings for the 2½ years between the accident and the trial, and $33,300.00 for loss of earning in the future. Appellant contends that both of these amounts are excessive.

For the year immediately prior to the accident appellee earned $4,530.44, of which $3,224.04 was for 1917 hours of straight time. The remainder was for 831¾ hours of overtime and premium overtime. For the three previous years ending in August 1951, 1950 and 1949 his earnings were $3,747.36, $3,197.87, and $3,672.44. For the 2½ years prior to the trial the District Judge computed the award on the basis of $4,530.00. He used this higher rate on the assumption that the years 1953 and 1954 would have been as good for appellant as the year immediately preceding because of the large amount of steel produced in those years. There was no evidence concerning the production of steel in those years. The Court declined to admit evidence offered by the appel-

lant as to the number of drydockings of the American Ship Building Company from 1950 to 1954 on the ground that it was speculative. For the years subsequent to the trial the Court used the average of the three years ending August 1949-1951, namely approximately $3,600. We do not believe the evidence justified using the highest rate of the four preceding years, including the substantial amount of overtime in that year without any proof of its probable reoccurrence, as the basis for the 2½ years prior to the trial. A fairer method, and one as favorable as the appellee could ask for under the evidence, would seem to be the average of the four years immediately preceding the accident, namely $3,787.00. *Porello v. United States,* 153 F. (2d) 605, 608, C. A. 2nd; 330 U. S. 446; *Carroll v. United States,* 133 F. (2d) 690, 694, C. A. 2nd. The difference of approximately $1,783.00 appears excessive.

We find no merit in appellant's contention that the District Judge gave no consideration to the possibility that appellee could be gainfully employed in the future in work of sedentary character which would not involve being in the presence of moving machinery or climbing around on heights. There was medical testimony that this was possible, but the evidence as a whole sustains the ruling that the appellee was unemployable.

We believe, however, that the award for lost wages in the future failed to give adequate consideration to the advancing age of appellee through the end of his life expectancy, the probable inability of appellee to continue full time employment until 78 years of age in a field of physical and sometimes hazardous labor, and the other hazards of continuous employment to which every employee is normally subject in our present industrial system. *Thompson v. Camp,* 163 F. (2d) 396, 403, C. A.

6th; *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545; *Florida East Coast R. W. Co. v. Young,* 104 Fla. 541, 140 So. 467, 87 A. L. R. 905; *Maziotte v. Bridgeport & W. Passenger Service,* 116 Conn. 32, 163 Atl. 409, 87 A. L. R. 908. On review in admiralty, the Court of Appeals can increase or decrease the amount of the award. *Standard Oil Co. v. Southern Pacific Co.,* 268 U. S. 146, 155, 160; *Carroll v. United States, supra,* 133 F. (2d) 690, 694, C. A. 2nd; *Dyke v. Massett,* 187 F. (2d) 895, 896, C. A. 5th; *Fauntleroy v. Argonaut S. S. Line,* 31 F. (2d) 941, 942, C. A. 4th. This part of the award will be reduced by approximately 25% to $25,000.00.

The judgment in the amount of $64,950.00 is reduced by the two amounts hereinabove indicated to $54,867.00 and as so modified, is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed June 5, 1956.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reduced from the amount of $64,950.00 to the amount of $54,867.00, and so reduced is affirmed.

FILED
OCT 25 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 357.

IMPERIAL OIL LIMITED,
Petitioner,

v.

FRANK DRLIK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

In an action by a longshoreman against a vessel owner based upon negligence, is the doctrine of assumption of risk applicable as a defense?

2. The second question raised in the petition relates to the question of whether respondent was guilty of contributory negligence. Because this is a pure issue of fact which was resolved by the trial court and approved by the Court of Appeals below after an examination of the record, respondent submits that this issue is not a proper subject to seek a review upon a writ of certiorari as required by Rule 19 of the Rules of this Court.

STATEMENT OF THE CASE.

It should be noted that the statement of facts stated by the petitioner is at variance with the findings of the Court below. Although the Court's findings of fact are those which are readily supported by the record it would serve no useful purpose to enter into any factual disputes since the question of law presented in this case would have to be resolved in the same manner under any interpretation of the facts.

REASONS FOR DENYING THE PETITION.

1. Under the Applicable Decisions of This Court, Assumption of Risk Is Not a Defense in Admiralty in a Longshoreman's Claim Based Upon Unseaworthiness or Negligence.

Petitioner alleges that the decision of the Court below is in conflict with several decisions of other Courts of Appeals and that this Court has not heretofore ruled upon the specific question involved. However, a careful review of this Court's latest pronouncements in this area of the law discloses that the issues presented in the case at bar has in fact been decided. Moreover, the authorities cited by petitioner, if they be deemed to be in conflict, have long since been superseded.

One of the first cases wherein this Court undertook to examine the rights of longshoremen, as compared to those of seamen, was *Atlantic Transportation Company v. Imbrovek*, 234 U. S. 52 (1913), 58 L. Ed. 1209. Justice Hughes, speaking for the Court, pointed out the identity existing between longshoremen and the members of the crew, both historically and in commercial reality. Said the Court at page 62:

> "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service

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devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' "

The next substantial advance in the law came in *International Stevedoring Company v. Haverty,* 272 U. S. 50, 52, 71 L. Ed. 157 (1926). In that case the Court was called upon to determine whether the Jones Act, legislation allegedly designed only for the benefit of members of the crew, applied to longshoremen as well. In ruling in the affirmative, the Court extended the benefits of the Jones Act with this language (p. 52):

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62, 58 L. ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case, they should be in the other."

The Court continued this trend to equate the rights of seamen and longshoremen as being identical in the admiralty law in *Seas Shipping Company v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1945). In that case the Supreme Court took pains to expressly point out that longshoremen could not be deprived of their rights as seamen, simply because they happened to be employed by a stevedoring contractor rather than directly by the vessel or her owners. In this regard the Court said (page 99):

"Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from the question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards . . .

"It would be anomalous if such a policy, effective to control such issues, were less effective when the question is simply whether the stevedore is entitled to the traditional securities afforded by the law of the sea to men who do the ship's work."

Since these rulings equate the rights of longshoremen under admiralty law with those of the members of the crew, it must logically follow that the permissive scope of affirmative defenses available to the shipowner must be the same irregardless of which of the two legally identical classifications plaintiff belongs to at the time.

In *Socony-Vacuum Oil Company v. Smith,* 305 U. S. 424, 83 L. Ed. 265, this Court laid down a broad general rule excluding assumption of risk as a defense in admiralty in these terms (p. 431):

"Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems

plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting by the owner . . . In either case the seaman's negligence is a contributing cause of his injury, without which the shipowner would be liable to the full extent of the damage.

"The incongruity and practical embarrassments in the application of a rule that the negligence in one case bars recovery, while that in the other only reduces the recoverable damages are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent . . .

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available."

It is significant that this Court did not base its holding on any provision of the Jones Act, but specifically pointed out on page 428:

"The Federal Employers' Liability Act . . . had left undisturbed the admiralty rule with respect to assumption of risk."

The *Sieracki* case followed the foregoing decision, thus bringing the claims of longshoremen clearly within the purview of the *Socony-Vacuum* case, as well as actions brought by members of the crew.

In *Pope & Talbot v. Hawn,* 306 U. S. 406, 98 L. Ed. 143, the affirmative defenses available at common law were asserted there, as here, as a bar to longshoremen's claims brought under admiralty law. There the shipowner again assailed the *Sieracki* case and attempted at the very least to water down its effect by injecting the contributory negligence doctrine, the companion common law defense to assumption of risk, into the admiralty law. This Court, however, reiterated its pronouncement in the *Sieracki* case and rejected the expansion of the scope of this common law affirmative defense which has been traditionally alien and repugnant to admiralty law. Mr. Justice Black lucidly stated this Court's position as follows (p. 408):

> "Petitioner urges that the jury finding of contributory negligence should have been accepted as a complete bar to Hawn's recovery. The contention appears to rest on two separate bases: (a) Admiralty has not developed any definite rule as to the effect of contributory negligence, and therefore the common-law rule under which contributory negligence bars recovery should govern in admiralty . . .
>
> "(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who

have contributed to their injuries to any degree, however slight."

In the case at bar petitioner admits that the defense of assumption of risk would not be available if respondent's claim were based upon unseaworthiness; however, it contends that since a right of recovery upon the ground of negligence must arise from the common law, it is, therefore, governed by the common law defenses. This contention is patently defective. Moreover, it has been dealt with squarely by this Court in the *Hawn* case at page 409:

> "Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features . . .' Panama R. Co. v. Johnson, 264 U. S. 375, 386, 68 L. ed. 748, 752, 44 S. Ct. 391. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and *negligence* is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling." (Emphasis supplied.)

The various circuit courts, in obedience to the mandate laid down by the Supreme Court in the aforementioned decisions, have been and are now in complete uniformity in denying the common law affirmative defenses of assumption of risk and contributory negligence in admiralty.

In *Gindville v. American Hawaiian S. S. Co.*, 224 F. 2d 746 (CA 3), Judge Goodrich in interpreting this Court's decisions on the very point under consideration said at page 748:

> "The negligence issue was submitted to the jury who found in the plaintiff's favor. One need only read the opinion in Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265, to get the

rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime injuries case. And one need only read Seas Shipping Co. v. Sieracki, 1946, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, to see the extension of rules protecting members of ships' crews to the longshoremen who come on to do what was originally part of the seaman's tasks."

In *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478, 480, affirmed per cur. 347 U. S. 846, 98 L. Ed. 798, Chief Judge Denman, in writing for the Ninth Circuit, made this comment regarding the assimilation of the longshoremen to the position of seamen:

"Judge Hand was correct in his interpretation of the Sieracki case assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.' "

In *Dixon v. United States*, 219 F. 2d 10 (CA 2), the question of assumption of risk was raised in an action by a crew member. In that case the trial court expressly pointed out that this defense was not available either in an action by a crew member or a longshoreman. This finding was affirmed in an opinion by Mr. Justice Harlan, then speaking for the Second Circuit Court of Appeals, in these terms:

"The lower Court held assumption of risk to be no defense . . . because as a matter of law the de-

> fense was invalid. We think both grounds were correct . . . As to the second, the American courts have uniformly refused to allow assumption of risk as a defense in a seaman's action for injuries under the general maritime law. See discussion in Arizona v. Anelich, 298 U. S. 110, 1936 A. M. C. 627; Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 1939 A. M. C. 1."

These are the latest expressions of the Supreme Court and the various Courts of Appeals on the issue under consideration. The five decisions which petitioner alleges conflict with the decision of the Court below were decided before the rule crystallized in the *Sieracki* case, *supra.* It, therefore, becomes apparent that they were decided upon common law defenses which this Court has found inappropriate and repugnant to admiralty law. More importantly these common law doctrines erroneously espoused by these cases are in vital conflict with the traditionally liberal and guiding principles of admiralty law as announced by this high tribunal.

A case by case analysis of the authorities cited by the petitioner, in support of their contention to extend common law defenses to admiralty law, will quickly illustrate their complete inapplicability to support this contention. *The Saratoga,* 94 Fed. 221 (CA 2), cited by petitioner, was decided in 1899. There the Court applied the common law defense, despite the fact that there was a relationship of master and servant. It also failed to apply the maritime rule, as distinct from the common law rule. The erroneousness of this decision is immediately apparent. Any conflict which arises between that decision and the case at bar has long since been resolved by later decisions of the Supreme Court in favor of the determination reached by the Court of Appeals in the present case. The same is true of *Cunard Steamship Co. v. Smith,* 255 Fed. 846, decided in 1918, which involved also a claim between master and servant. *Gaderson v. Texas Construction Company,* 3 F. 2d

140, decided in 1924, involved a claim by a stevedore against his own employer. The libel was dismissed upon the finding in that case that the doctrine of assumption of risk was applicable in admiralty. That decision is not only obviously in conflict with the *Sieracki* and subsequent cases, but also with the *Haverty* case in which this Court ruled specifically to the contrary in the very same type of action. Petitioner next cited at length from *Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300, 1928 A. M. C. 204, decided in 1928, in which a state court took a position, which this Court was later to repudiate, that a longshoreman is not a seaman under the general maritime law and that, therefore, he is subject to the common law defenses. Finally, in *Sheffler v. Moran Towing & Transportation Co.*, 68 F. 2d 11, decided in 1933, the Court there held that a deckhand on the vessel assumed the risk of an unseaworthy condition. The error in that decision in view of the present development of the law is so glaring as to hardly deem the dignity of any comment. Moreover, since the claimant in that case was a member of the crew, it would appear that petitioner wishes this Court to go further and turn back the hands of the clock by erroneously applying an assumption of risk doctrine not only to longshoremen but also to members of the crew. The adoption of this reasoning of the *Sheffler* decision would be in direct contradiction to the very language of this Court in the *Socony-Vacuum* case.[1]

It is significant that petitioner stopped its research with the *Sheffler* case, despite the fact that in the following decade this Court crystallized the rule in unequivocal terms that the common law defenses of assumption of risk or contributory negligence should not apply in admiralty. Furthermore, the decisions from the various circuits have since that time been uniformly consistent both within and

1. Parenthetically, it may be noted that petitioner concedes that even in the case of a longshoreman the doctrine of assumption of risk is not applicable in a case based upon unseaworthiness (Petitioner's brief p. 13, App. 156a).

among themselves in following the Supreme Court's determination.

The fact is that this Court has decided the issue presented in the case at bar. Moreover, there is presently no conflict on the point. The decision of the court below, therefore, is in strict compliance with the decisions of this Court, and it is consistent with the decisions in the various other circuits.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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